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In the Supreme Court of the United States

OCTOBER TERM — 1973

YVONNE ALVAREZ SCHENNAULT, A/K/A YVONNE ALVAREZ, AS SECRETARY, CAPITAL ENTERPRIZE BUILDING CORP.; CAPITAL ENTERPRIZE BUILDING CORP., AND IRA BURMAN,

Petitioners,

VS.

UNITED STATES OF AMERICA AND KEVIN E. NESTOR, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on June 25, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit will not be published, 478 F. 2d 1406, but is printed in full as an Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*) was entered on June 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where an Internal Revenue Service summons is issued in cooperation with the Bureau of Narcotics and Dangerous Drugs, is the validity of such summons to be determined by applying the inter-agency influence test of *Abel* v. *United States*, 362 U.S. 217 (1960), or the tax purpose test of *Donaldson* v. *United States*, 400 U.S. 517 (1971)?

2. Regardless of the standard applied in determining the validity of the Internal Revenue summons, did the district court unduly restrict the scope of the summons enforcement hearing: (1) by refusing to require the disclosure of narcotics agents with whom the Internal Revenue special agent was cooperating in investigating Petitioner Schennault? (2) by quashing subpoenas which requested disclosure of procedural directives relating to inter-agency cooperation and dissemination of information between the Internal Revenue Service and the Bureau of Narcotics and Dangerous Drugs?

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. §7602

> "Examination of books and witnesses:
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any

transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other date which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

26 U.S.C. §7604

"Enforcement of summons:

(a) Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424(d) (2), 6427(e) 2), or 7602 neglects or refuses to obey such

summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

STATEMENT

The principal petitioner in the district court was Kevin E. Nestor, a Special Agent of the Internal Revenue Service. On March 14, 1972 Special Agent Nestor served similar summonses on Yvonne Alvarez Schennault, Capital Enterprize Building Corporation and their attorney Ira Burman, all petitioners herein, seeking production of various books, records and documents. On March 27, 1972, pursuant to the directive of the summonses, petitioners appeared at the offices of the Internal Revenue Service but refused to testify or to produce any documents or records.

On May 4, 1972, Special Agent Nestor filed in the United States District Court for the Northern District of Illinois, Eastern Division, a petition to enforce the foregoing summonses. A hearing concerning the validity of the summonses was held on August 29 and 30, 1972 after which

the district court entered a judgment in favor of enforcement of the summonses requiring respondents to produce the demanded materials. This order was affirmed by the Seventh Circuit on appeal.

The summonses which are the subject matter of the instant proceeding were issued by Kevin E. Nestor, a Special Agent in special enforcement Group 203 of the Internal Revenue Service (App. 78)[1]. Because of its importance to the instant petition, a brief history of special enforcement Group 203 will hereafter be set forth.

Group 203 of the Internal Revenue Service was organized in August, 1971, for the express purpose of investigating people identified by the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs as alleged middle and upper echelon narcotic traffickers. (App. 78, 123). The subjects of investigation are obtained through the submission of names by local offices of the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs to a Treasury Selection Committee in Washington, D.C. (App. 128). This national committee, which includes representatives of each involved organization, chooses the particular subjects of investigation and furnishes these names to the representative local offices of Group 203. (App. 128). Agents of Group 203 are advised to conduct their investigation with a "spirit of cooperation" with agents of the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs. (App. 125). Such cooperation is accomplished informally among the agents themselves through the free interchange of agency files as well as an encouraged policy of meetings among

[1] Citation is to Appellant's Appendix on appeal to the Seventh Circuit.

such agents to exchange information. (App. 124-126). In addition, there exists a liaison group in Washington, D.C., specifically referred to as the Narcotics Project Manager, whose function is to disseminate among each participating agency any information supplied by the investigating agents. (App. 131). In this regard, therefore, Group 203 reports directly to Washington, D.C., as opposed to a normal tax investigation which proceeds through the internal local and regional offices of I.R.S. (App. 131).

It was through this procedure that Yvonne Schennault became an object of investigation by special enforcement Group 203. (App. 129, 103). Upon submission of her name a preliminary case control card was prepared (App. 166) which noted the intragovernmental referral and her alleged involvement in narcotics traffic. (App. 108-110). The Group 203 supervisor, Robert Fuesel, assigned Special Agent Nestor to investigate Yvonne Schennault.

Prior to the issuance of the subject summonses and within two weeks after his assignment of this case, Special Agent Nestor spoke to investigation agents of the Bureau of Narcotics and Dangerous Drugs concerning Yvonne Schennault and reviewed that agency's operating files. (App. 84, 85, 93). Such communications continued on a regular basis prior to the issuance of the summonses, Nestor admitting that he spoke to at least three agents of the Bureau of Narcotics and Dangerous Drugs concerning Yvonne Schennault (App. 85); that he had five to seven different conversations with these agents (App. 93); that he took notes of these conversations (App. 86); and that he disclosed information he had concerning Mrs. Schennault to these agents. (App. 95). Subsequently, Nestor advised the narcotics agents of the issuance of these summonses. (App. 97).

During the course and in aid of his specific investigation of Mrs. Schennault, Special Agent Nestor sought to obtain various records of respondent Capital Enterprize Building Corporation, which Nestor considered Mrs. Schennault's alter ego. (App. 103, 118-119). Upon failing to obtain these records, Nestor issued the subject summonses which called for Mrs. Schennault to testify and produce the following:

> "All books and records pertaining to the operations of Capital Enterprize Building Corporation for the periods beginning 7-1-66 and ending 6-30-71 including but not limited to the following specific records: 1) Bank statements, cancelled checks, deposit slips (tickets) and check stubs of all corporate bank accounts. 2) Monthly rental list (statement) reflecting names of tenants, apartment building addresses and monthly rental. 3) Monthly, quarterly, semi-annual and annual profit and loss statements for each building. 4) Payroll records. 5) Cash receipts and disbursement journals. 6) Corporate minute book. 7) Cash book maintained for rents paid in currency. 8) General ledger accounts including accounts of income and expense (i.e. operating ledger). And all notes and memoranda dealing with the operation of Capital Enterprize Building Corporation."

A similar summons was served on respondent Ira Burman, Mrs. Schennault's attorney. Respondents refused to testify or produce such records asserting the personal nature of the records, the Fifth Amendment's privilege against self-incrimination and the fact that the issuance of the summons was an abuse of process since it was issued for an illegal purpose, that is, as an aid to a criminal investigation for a non-tax related offense.

A summons enforcement proceeding was begun in the United States District Court for the Northern District of Illinois, Eastern Division. At the hearing on such en-

forcement the district judge concluded that he would follow his understanding of *Donaldson* v. *United States,* 400 U.S. 517 (1971), that as long as a purpose of the summons was a possible assertion of civil tax liability, that is sufficient to sustain enforcement of the summons despite any coincident relationship with the Bureau of Narcotics. (App. 87). The court refused to follow respondents' argument premised on *Abel* v. *United States,* 362 U.S. 217.

Prior to the enforcement hearing, respondents served subpoenas duces tecum on Special Agent Nestor, his group supervisor Robert Fuesel and the District Director of Internal Revenue seeking production at the hearing of any memoranda or instructions issued by the Attorney General, the Internal Revenue Service, the Bureau of Narcotics and Dangerous Drugs, the Federal Bureau of Investigation or the Bureau of Customs relating to the creation and operation of Group 203 and its specific procedures concerning inter-agency cooperation and the dissemination of information. The district court granted the Government's motion to quash these subpoenas (App. 69, 71).

In addition, the district court repeatedly refused to require the government to disclose the names of the agents of the Bureau of Narcotics who cooperated in Special Agent Nestor's investigation so the respondents might call them to testify concerning their conversations with Agent Nestor. (App. 44, 85, 118, 126). The government was also successful in refusing to produce Agent Nestor's notes of his conversations with these agents. (App. 87).

Each of the district court's rulings was affirmed by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

At the enforcement hearing in the district court, the respondents offered substantial evidence, through agents of the Internal Revenue Service, substantiating the fact that the instant "tax" investigation arose as a direct referral from the Bureau of Narcotics and Dangerous Drugs. (App. 103, 129). Additionally, it was established that the investigating Internal Revenue agents were advised to cooperate fully with agents of the Bureau of Narcotics in the exchange of information and, in fact, such cooperative effort had already been utilized in the instant joint investigation of Yvonne Schennault. (App. 93-95, 124-26). Despite acknowledging this cooperative relationship between the Internal Revenue Service and the Bureau of Narcotics and Dangerous Drugs, the district judge chose to enforce the summonses based on his understanding of *Donaldson* v. *United States,* 400 U.S. 517 (1971)—that as long as "*a* purpose of the summons was a possible assertion of civil tax liability, that is sufficient to sustain enforcement of a summons." (App. 87). Similarly, the Court of Appeals placed heavy reliance on the *Donaldson* opinion. (App. A. 7).[2]

The Supreme Court has heretofore determined that a criminal investigatory government agency cannot use the process of another administrative department in order to obtain evidence of criminal offenses. *Abel* v. *United States,* 362 U.S. 217 (1960). In *Abel,* a serious question was raised whether agents of the Federal Bureau of Investigation used the administrative process of the Immigration and Natural-

[2] Citation is to the opinion of the Seventh Circuit Court of Appeals attached hereto as App. A.

ization Service in order to obtain evidence of the defendant's participation in espionage activities. Though the Court ultimately determined that the facts did not warrant such a conclusion, it did emphasize that if true such activity must meet stern resistance by the courts:

> "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of getting evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States." 362 U.S. at 226, (Emphasis added.)

As an aid in determining whether an inter-agency abuse of process existed, the Supreme Court explicitly set forth the test to be applied:

> "The test is whether the decision to proceed administratively . . . was influenced by, and was carried out for a purpose of amassing evidence in the prosecution for crime." *Abel* v. *United States,* 362 U.S. at 230.

The basic principle espoused in *Abel* requires a court to determine whether an agency in issuing its process is acting in good faith or whether it is merely serving as a tool for another criminal investigatory agency. The test is clearly not one of exclusiveness, that is, one agency's administrative process need not be issued solely for the benefit of another agency's criminal investigation. The test, rather, is one of influence—was the issuance of one agency's process influenced by and carried out for another criminal investigatory agency's desire to amass evidence for crim-

inal prosecution. *Abel* v. *United States,* 362 U.S. 217, 230 (1960). This is the standard which must be applied to determine whether an abuse of administrative process exists. See *United States* v. *Baca,* 444 F. 2d 1292 (10th Cir. 1971); *cf., Anderson* v. *United States,* 318 U.S. 350; *United States* v. *Schafer,* 461 F. 2d 856 (9th Cir. 1972).

Donaldson, on the other hand, involved the issuance of an Internal Revenue summons solely for a tax purpose—whether it was criminal, civil or both. What is clearly evident from the Supreme Court's analysis in *Donaldson,* and what is critical to the instant petition, is that *Donaldson* involved the peculiar *intra-agency* Internal Revenue problem of civil tax and criminal tax investigation. It did not involve the use of *inter*-agency cooperation for criminal investigative purposes as did *Abel.* The distinction is clearly evident from the Supreme Court's careful analysis in *Donaldson* wherein it specifically and repeatedly referred to the distinctive attributes of the Internal Revenue Service's investigative procedures, including: (1) the separation of district offices into audit and criminal tax divisions; (2) the joint participation by revenue and special agents "in the conduct of *tax fraud* investigations"; (3) the internal review "programs for the investigation of alleged *tax frauds* and 'certain other civil and alleged criminal violations of *tax laws*"; (4) its emphasis on "the fact that a full-scale *tax fraud* investigation is being made does not necessarily mean that prosecution ensues when *tax liability* becomes apparent; (5) the specific references to statutory definitions of "*tax*" to include any additions or penalty; and (6) the Court's refusal to distinguish between a revenue agent and a special agent in "tax fraud" investigations. *Donaldson* v. *United States,* 400 U.S. at 534-36.

The entire *Donaldson* opinion is premised on the uniqueness of the Internal Revenue Service and its internal joint tax fraud investigations. Once this realm is over-stepped into the area of *inter*-agency "cooperation", then *Abel,* and not *Donaldson,* should control.

To grant certiorari in this case would afford the Supreme Court an opportunity to clarify the test district courts are to apply to determine if there may be an abuse of process in the enforcement of an Internal Revenue summons where *inter*-agency cooperation is apparent. This issue is of significant importance not only to petitioners but to the government as well since the government has apparently established extensive national, local and personal procedures for *inter*-agency cooperative investigations specifically relating to the Internal Revenue Service.[3]

II.

In challenging the validity of an Internal Revenue summons, the cases are legion that the respondent is entitled to a protracted adversary hearing for the purpose of showing that the summons was issued for an illegal purpose. *Reisman* v. *Caplan,* 375 U.S. 440 (1964); *Powell* v. *United States,* 379 U.S. 48 (1964). This concept of an adversary hearing prior to the enforcement of an Internal Revenue summons has recently been reaffirmed by the Supreme Court in *Donaldson* v. *United States,* 400 U.S. 517 (1971). The problem which continuously arises in summons enforcement cases, however, is what constitutes a sufficient adversary hearing. This issue, not reached in *Donaldson,* has not yet been decided by the Supreme Court.

The district court herein clearly restricted the scope of the required adversary hearing by excluding important relevant evidence which may well have had a significant

[3] See pp. 5-6 of this Petition.

bearing on the validity of the subject summonses even accepting the test proffered in *Donaldson* v. *United States.* The *Donaldson* standard to be applied by the district courts in determining the validity of a summons was explicitly set forth by the Court as follows:

> "We hold that under §7602 an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith *and* prior to a recommendation for criminal prosecution." 400 U.S. at 526, (emphasis supplied).

Thus, the *Donaldson* standard is a dual one, and as such, two mutually exclusive determinations must be made by a court before it can reach a decision as to the validity of a summons. If, in fact, there has been no recommendation for criminal prosecution, the court must then proceed to consider whether the summons has been issued in bad faith. This precise analysis has been approved in *United States* v. *Kessler,* 338 F. Supp. 420 (S.D. Ohio 1972), wherein the court specifically interpreted the dual nature of the *Donaldson* test. See also *United States* v. *Billingsley,* 469 F. 2d 1208 (10th Cir. 1972).

Therefore, assuming *arguendo* that there has been no recommendation for criminal prosecution in the case at bar, there still remains the issue of "good faith", regardless of whether the standard to be applied is the one enunciated in *Donaldson* or the one enunciated in *Abel* v. *United States,* 362 U.S. 217 (1960). Furthermore, the issue of good faith is, by definition, one that is highly subjective, and as such, the trier of fact, in order to carry out the dictate in *Donaldson* or *Abel* is obligated to review any and all pertinent facts bearing on the issue prior to formulating a decision.

In addition, in order to fully comprehend the circumstances herein, this Court must keep in mind a distinctive feature of the summons enforcement proceeding. The nature of this proceeding is somewhat paradoxical in that while the respondents have the burden of proving an illegal purpose, *Donaldson* v. *United States,* 400 U.S. 517 (1971), the Government is the repository of all facts which bear on the respondents' burden. In order to meet their burden and make the hearing truly an adversary one, respondents, of necessity, are required to elicit certain facts from the Government which could weigh against the Government's asserted good faith.

During the course of the hearing below, the district court on successive occasions refused to require the Government to disclose the names of the agents of the Bureau of Narcotics and Dangerous Drugs who cooperated in Special Agent Nestor's investigation, as well as the notes of the five or seven conversations between Special Agent Nestor and these agents. In addition, the district court refused to enforce any of the three subpoenas issued to the District Director, Special Agent Nestor, and Special Agent Nestor's group supervisor, Robert Fuesel. Each of the subpoenas sought the same information—any memoranda or instructions issued by the cooperating agencies relating to the creation and operation of Group 203 and its specific procedures concerning inter-agency cooperation and the dissemination of information.[4]

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[4]"All memoranda, statements, orders or instructions issued by or to the Internal Revenue Service which reflect the directives, goals, policies, procedures, purposes and authorizations establishing or causing the establishment by the Internal Revenue Service of special enforcement groups, and in particular, Group 203, for the purpose of conducting Internal Revenue Service investigations of individuals suspected of or alleged to be part of the narcotics (Footnote continued)

It is clear that each of these inquiries was relevant to the issue of good faith as well as being solely within the knowledge of the Government. cf. *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963). Significant evidence was elicited from the two Internal Revenue agents who testified at the enforcement hearing establishing the encouraged "spirit of cooperation" between the investigating "tax" agent and agents of the Bureau of Narcotics and Dangerous Drugs. (App. 124-126; Br. at 11-12). The Internal Revenue agents were specifically advised to exchange information with the narcotics agents who were investigating the same person for narcotics offenses. (App. 124-126) This dissemination of information was to occur on a personal level as well as through the Narcotic Project Manager, a national office specifically organized to funnel information from the investigating Internal Revenue agents of Group 203 to the Bureau of Narcotics. (App. 126, 131). In quashing the foregoing subpoenaes, the district court foreclosed respondents from introducing the directives of the participating agencies concerning inter-agency cooperation, clearly relevant and important evidence bearing in the issue of the Government's good faith. Furthermore, it should be noted that respondents herein were not seeking to rummage in the Government files for specific evidence obtained against respondent Schennault. What respondents sought was merely the procedures and directives of cooperation and dissemination.

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traffic, including but not limited to, directives, agreements, policy statements, etc., of: (1) the Internal Revenue Service; (2) the Attorney General of the United States, and (3) those issued between the Internal Revenue Service and any other law enforcement agency of the United States including, in particular, the Bureau of Narcotics and Dangerous Drugs, the Federal Bureau of Investigation, and the Bureau of Customs, which relate to inter-agency cooperation, coordination and dissemination of information acquired as a result of such investigations."

Additionally, the refusal to require the Government to disclose the names of the "cooperating" agents of the Bureau of Narcotics unduly limited respondents from adducing relevant evidence on the issue of the Government's good faith. As hereinabove discussed, Special Agent Nestor testified to having at least five to seven different conversations with three narcotics agents to whom he admitted disclosing information he had obtained concerning Mrs. Schennault. (App. 84-85, 93-97). The respondents sought to call these agents as witnesses bearing on the good faith issue but were unable to do so because of the court's order. The relevancy of such evidence cannot be questioned since it may well have been that the testimony of the narcotics agents would have shed a different light upon Special Agent Nestor's testimony that there was *a* civil tax purpose to the investigation. Nevertheless, through its refusal to require disclosure, the district court recognized that the special agent's testimony concerning the purpose of the summons would be conclusive as to the "good faith" requirement of *Donaldson.*

An apparent conflict in the Circuit Courts of Appeal has arisen as to the scope and procedures to be followed in summons enforcement hearings. The Fifth Circuit in *United States* v. *Roundtree,* 420 F. 2d 845 (5th Cir. 1969), acknowledged application of the Federal Rules of Civil Procedure to these cases including full relevant discovery prior to the hearing. The First Circuit, on the other hand, in *United States* v. *Salter,* 432 F. 2d 697 (1st Cir. 1970), requires that the hearing be held initially at which time the respondent-taxpayer must establish some substantial evidence supporting his allegations of improper purpose before the district court may grant any discovery. Such a task is difficult, at best, since, as previously noted, the Gov-

ernment is the storehouse of the relevant facts which bear in the respondent's burden. On the instant appeal the Seventh Circuit has apparently adopted a third test, though it is somewhat akin to the *Salter* position. By restricting the scope of the hearing the district court relegated counsel to the testimony of the special agent that there was a tax purpose in the investigation and the issuance of the summons. The Seventh Circuit held that the district court did not abuse its discretion so holding (App. A. 9-10).

This case thus affords the Supreme Court an opportunity to define the discovery and scope of summons enforcement proceedings as an aid to the district courts which repeatedly are being presented with this issue.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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